

practice be one “between such employee, his agent, or collective-bargaining representative, and his employer.”<sup>81</sup>

(f) Another qualification of the “custom or practice” referred to in the statute is that it be “not inconsistent with a written or non-written contract” of the kind mentioned therein. If the contract is silent on the question of compensability of the activity, a custom or practice to pay for it would not be inconsistent with the contract.<sup>82</sup> However, the intent of the provision is that a custom or practice which is inconsistent with the terms of any such contract shall not be taken into account in determining whether such an activity is compensable.<sup>83</sup>

**§ 790.11 Contract, custom or practice in effect “at the time of such activity.”**

The “contract,” “custom” or “practice” on which the compensability of the activities referred to in section 4 of the Portal Act may be based, is a contract, custom or practice in effect “at the time of such activity.” Thus, the compensability of such an activity, and its inclusion in computation of hours worked, is not determinable by a custom or practice which had been terminated before the activity was engaged in or was adopted some time after the activity was performed. This phrase would also seem to permit recognition of changes in customs, practices and agreements which reflect changes in labor-management relations or policies.

**§ 790.12 “Portion of the day.”**

A “preliminary” or “postliminary” activity of the kind referred to in section 4 of the Portal Act is compensable under a contract, custom, or practice within the meaning of that section “only when it is engaged in during the portion of the day with respect to which it is so made compensable.”<sup>84</sup> This provision in no way affects the

compensability of activities performed within the workday proper or the computation of hours worked within such workday for purposes of the Fair Labor Standards Act;<sup>85</sup> the provision is applicable only to walking, riding, traveling or other “preliminary” or “postliminary” activities of the kind described in section 4(a) of the Portal Act,<sup>86</sup> which are engaged in outside the workday, during the portions of the day before performance of the first principal activity and after performance of the last principal activity of the employee.<sup>87</sup>

DEFENSE OF GOOD FAITH RELIANCE ON ADMINISTRATIVE REGULATIONS, ETC.

**§ 790.13 General nature of defense.**

(a) Under the provisions of sections 9 and 10 of the Portal Act, an employer has a defense against liability or punishment in any action or proceeding brought against him for failure to comply with the minimum wage and overtime provisions of the Fair Labor Standards Act, where the employer pleads and proves that “the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation” or “any administrative practice or enforcement policy \* \* \* with respect to the class of employers to which he belonged.” In order to provide a defense with respect to acts or omissions occurring on or after May 14, 1947 (the effective date of the Portal Act), the regulation, order, ruling, approval, interpretation, administrative practice or enforcement policy relied upon and conformed with must be that of the “Administrator of the Wage and Hour Division of the Department of Labor,” and a regulation, order, ruling, approval, or interpretation of the Administrator may be relied on only if it is in

<sup>85</sup> See §§ 790.4–790.6.

<sup>86</sup> Conference Report, pp. 12, 13.

<sup>87</sup> See Conference Report, p. 13; §§ 790.4(c) and 790.5(b).

The scope of section 4(c) is narrower in this respect than that of section 2(b), which is couched in identical language. Cf. Conference Report, pp. 9, 10; pp. 12, 13. See also § 790.23.

<sup>81</sup> See § 790.9(d).

<sup>82</sup> Senate Report, pp. 45, 49; colloquy between Senators Donnell and Hawkes, 93 Cong. Rec. 2179.

<sup>83</sup> Senate Report, pp. 45, 49.

<sup>84</sup> Section 4(c) of the Portal Act (set out in full in § 790.3).